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IN THE

# Supreme Court of the United States

October Term, 1966

No. 465

EMILIO EMINENTE,

*Petitioner,*

*vs.*

LYNDON BAINES JOHNSON, ROBERT S. MCNAMARA, DEAN RUSK,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI.

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LYNDON BAINES JOHNSON, ROBERT S. MCNAMARA, DEAN RUSK,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI.

Petitioner hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

### Opinions Below.

This cause was, on motion of respondents, dismissed below without trial. An order by the District Court, of dismissal as to respondent Johnson, entered August 30, 1965, is unreported. An order of the District Court dismissing the cause generally, entered October 22, 1965, is also unreported. The opinion of the Court of Appeals [R. 17-18] is reported at 361 F. 2d 73.

### Jurisdiction.

The judgment of the Court of Appeals was entered May 3, 1966 [R. 19]. A petition for rehearing was filed on May 13, 1966 [R. 22]. The said petition for

rehearing was denied on May 23, 1966 [R. 23]. The jurisdiction of this Court is based on 28 U.S.C. §1254-(1). By an order of this Court entered August 10, 1966, the time for filing this petition was extended to and including September 21, 1966.

## Questions Presented.

This is a suit for damages to property located in a foreign country. The questions presented are whether, under the allegations in the complaint, (1) this suit is an unconsented suit against the United States; (2) this suit is nonjusticiable; and (3) the petitioner lacks the so-called standing to sue.

The first two questions are presented by the opinion of the court below, and the third by the concurring opinion therein. It does not appear that the court below has questioned the right of petitioner to bring the action, merely on the ground that he is a nonresident alien, express authorization for such a suit being provided in 28 U.S.C. §1350.

As to the third question above, that question, as shown below, really does not arise here. We mention it only for the purpose of showing this.

## Statutes Involved Here.

The statutes supporting the jurisdiction of the District Court are as follows:

28 U.S.C. §1332(a)(2), §1332(d):

§1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in

controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

* * *

(2) citizens of a State, and foreign states or citizens or subjects thereof; . . . .

* * *

(d) The word "States," as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. §1350:

§1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. §1391:

§1391. Venue generally

* * *

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

## Statement.

The complaint [R. 3-9] alleges: (1) that petitioner is a resident and citizen of France; (2) that he now owns certain properties located in the Democratic Republic of North Vietnam, a precise and detailed schedule of which is attached to the complaint; (3) that he is in full enjoyment of said ownership, and of the expectation of future fruits therefrom; (4) that respondent Johnson is President of the United States, respondent McNamara, Secretary of Defense, and respondent Rusk, Secretary of State; (5) that the action is not brought against the United States, nor against respondents in their official capacities; (6) that no recovery is sought from the United States through a judgment against respondents; (7) that respondents, individually and in combination, have done and conspired to do the following acts: sending military aircraft in bombing raids upon the Democratic Republic of North Vietnam, from which damages have resulted to the said properties of petitioner; committing numerous trespasses, nuisances and waste upon the said properties of petitioner by means of overflights, high explosives, fire bombs, napalm bombs, aircraft cannon shells, leaflets and other similar and diverse means; (8) that said acts:

> (a) were not defensive actions but were acts of war carried out without the declaration by the Congress of the United States required by the Constitution thereof;
>
> (b) were committed solely for the purpose of attempting to contain, impede or destroy a theory or philosophy or system of production and distribution wholly outside and beyond the boundaries of the United States;

(c) were not committed for the public benefit of the people of the United States but for the private benefit of, and upon the demand of, special interests within the United States and elsewhere;

(d) were wholly and scienter outside and beyond the power of respondents as officers of the United States, wholly outside and beyond the power to authorize of the Congress of the United States, and in violation of the Constitution of the United States, the treaties made pursuant thereto, and the law of nations;

(9) that as a direct and proximate result of said acts committed by respondents upon and across and within the vicinity of said properties petitioner has been damaged in an amount which, inclusive of economic value, exceeds One Million Dollars. The complaint then prays judgment against respondents that they be ordered to pay petitioner the damages incurred.

As filed the complaint also sought related injunctive relief. However, in the course of oral argument before the Court of Appeals, petitioner through his counsel made the point that the claim for injunctive relief and the claim for damages were separable. Thereupon there was a question from the court as to whether petitioner was withdrawing the claim for injunctive relief. Petitioner's counsel responded in the affirmative. As a result, the cause as submitted in the court below was one for damages only. [R. 20.]

In the District Court no answer was filed. A motion was filed by the United States Attorney for the District of Columbia to enter *sua sponte* an order of

dismissal as to respondent Johnson [R. 11]. The District Court granted the motion [R. 12-13]. Thereafter respondents McNamara and Rusk made a motion for dismissal [R. 14]. The District Court thereupon made the final order of dismissal from which appeal was taken [R. 15]. The Court of Appeals affirmed [R. 19].

## Reasons for Granting the Writ.

The decision below is in clear conflict with applicable decisions of this court.

### A. On the Question Whether, Under the Allegations in the Complaint, This Is an Unconsented Suit Against the United States.

The complaint is expressly only against respondents as private individuals. Furthermore, it expressly disavows any intention to recover indirectly from the United States, through a judgment against respondents. The court below treated this action nevertheless as an action against the United States. What it did in effect was to extend to respondents the immunity of the United States to suits to which it has not consented. But in applying that doctrine here, the acts complained of being clearly alleged to be beyond the scope of respondents' authority, the court below is in direct conflict with decisions of this court.

Thus, in *Philadelphia v. Stimson*, 223 U.S. 605, at pp. 619-620, this court stated:

> "The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded . . . And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The prin-

ciple has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments . . . And it is equally applicable to a *Federal officer acting in excess of his authority or under an authority not validly conferred.* The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power; *it is not a suit against the United States.*" (Italics supplied).

In *Goltra v. Weeks,* 271 U.S. 536, this court stated, at page 544:

"Neither they nor the government which they represent could trespass upon the property of another, and it is well settled that they may be stayed in their unlawful proceeding by a court of competent jurisdiction, even though the United States for whom they profess to act is not a party and cannot be made one. By reason of their illegality, their acts or threatened acts are *personal* and derive no official justification from their doing them in asserted agency for the government." (Italics supplied).

In *Larson v. Domestic & Foreign Commerce Corporation,* 337 U.S. 682, 696, quoting from *United States v. Lee,* 106 U.S. 196, 220, this court stated:

"The defense stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only

> that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty or property without due process of law, or to take private property without just compensation."

In *Baker v. Carr,* 369 U.S. 186, at page 211, this court stated that the question whether the action of the particular branch of the government "exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

In *Dugan v. Rank,* 372 U.S. 609, 621-622, this court stated:

> "Those exceptions are (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. *Malone v. Bowdoin, supra,* 369 U.S. at 647, 82 S.Ct. at 983, 8 L.Ed. 2d 168. In either of such cases the officer's action 'can be made the basis of a suit for specific relief against the officer as an individual. . . .' Ibid."

And in *Wheeldin v. Wheeler,* 373 U.S. 647, at pp. 650, 651, it was held that the immunity doctrine is not applicable if, under the allegations in the complaint, the officer "was not acting sufficiently within the scope of his authority to bring the doctrine into play"; and, at page 648, for that purpose the complaint is to be read "most favorably" to the plaintiff. Indeed, it was there also held, at page 649, that the court has jurisdiction even where "the right of the petitioners to re-

cover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another."

Clearly then, on the question whether this is an unconsented suit against the United States, the decision below is in clear conflict with decisions of this court.

**B. On the Question Whether, Under the Allegations in the Complaint, This Suit Is Nonjusticiable.**

What the court below says in this respect is that the suit is nonjusticiable because it is based on "damage to property in a foreign country caused by the armed forces of the United States acting under authority of the Government of the United States." Just what this compound explanation means is hardly clear. Let us examine it by its separate components.

The court below could certainly not have meant that the cause was nonjusticiable merely because the property was located in a foreign country. The express purpose of 28 U.S.C. §1350, quoted above, to protect an alien against a tort committed in violation of the law of nations or a treaty of the United States, would make but little sense if the property had to be in the United States. And the statute spells out no such limitation. Nor could the court below have meant that the case was nonjusticiable merely becuuse the acts were committed by the armed forces of the United States. That would assume that the United States was completely a military state. The court below must have had in mind rather its assumption that the armed forces in committing the acts were acting under the authority of what it called the "Government" of the United States.

However, there is no allegation here that the acts complained of were authorized by the "Government" of the United States. We shall therefore take the three branches of the "Government" separately. Taking the legislative branch first, the allegations definitely do not allege, but on the contrary deny, that the acts complained of were authorized by the *Congress* of the United States. Indeed, they go so far as also to challenge the authority of Congress to authorize the said acts. Taking the judicial branch next, the allegations do not allege or concede that the said acts were authorized by any *court* of the United States. Perhaps, then, what the Court of Appeals meant was that the acts complained of were, as alleged by the complaint, acts authorized by respondent Johnson acting under color of his authority as *President* of the United States. Such, indeed, the said acts were.

Great, however, as the power of the individual who is President may be, he is not above the law. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 588-589, in which an order issued by President Truman, directing the Secretary of Commerce to take possession of and operate most of the nation's steel mills, was enjoined on the ground that the order, though in wartime, exceeded the President's constitutional powers. See also *United States v. Burr,* 25 Fed. Cases 30, 34, in which Chief Justice Marshall issued a *subpoena duces tecum* to President Jefferson, as related in footnote 6, page 739, of *Christoffel v. U.S.* (91 App. D.C. 241), 200 F. 2d 734, cert. denied 348 U.S. 850.

Nor is this result avoided merely because the acts complained of here were committed by the armed forces of the United States on the President's orders, or by

other armed forces paid by the Treasury of the United States on orders of the President. *Qui facit per alium facit per se.* The President acts necessarily through agents. So he did in *Youngstown Sheet & Tube Co. v. Sawyer, supra.*

Nor could this result be avoided here by saying that the action of the President involved foreign policy and therefore presents a political question. In *Nixon v. Herndon,* 273 U.S. 536, at p. 540, cited and quoted from in *Baker v. Carr, supra,* at page 209, this court stated:

> "The objection that the subject-matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage."

Thus it is clear that authorization by the President of the acts complained of does not make the suit non-justiciable. If that is what the Court of Appeals meant it is in clear conflict with decisions of this court.

**C. On the Question of Petitioner's Standing to Sue.**

This question, as noted above, relates only to the concurring opinion in the court below. However, under the allegations here that issue really does not arise. Petitioner here is suing on his behalf only, and only in respect of damages to his own property. Damage to the property of others, or any people at large, is not involved. Thus *Pauling v. McElroy* (App. D.C.), 278 F. 2d 252, cert. denied 364 U.S. 835, and *Pauling v. McNamara,* 331 F. 2d 796, cert. denied 377 U.S. 933, relied on in the concurring opinion, are in no way pertinent. There the complainants did not "allege a spe-

cific threatened injury to themselves, apart from others, but rather set themselves up as protestants on behalf of all mankind." 278 F. 2d at p. 254. Of course, we do not deny that a decision by this court herein would indirectly, but *purely because of the questions of law decided,* have far-reaching effects as far as other persons are concerned. But that is true of any decision of this court. It would only go to show the importance of the questions presented, and would therefore be an additional reason *for* granting the writ.

Wherefore, petitioner prays that this court issue the writ of certiorari sought herein to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

GEORGE T. ALTMAN,
*Attorney for Petitioner.*

## APPENDIX.

### Opinion of the United States Court of Appeals for the District of Columbia Circuit.

United States Court of Appeals for the District of Columbia Circuit.

Emilio Eminente, Appellant, vs. Lyndon Baines Johnson, et al., Appellees, No. 19802.

Appeal from the United States District Court for the District of Columbia.

Decided May 3, 1966.

*Mr. George T. Altman,* of the bar of the Supreme Court of California, *pro hac vice,* by special leave of court, with whom *Miss Lola Boswell* was on the brief, for appellant.

*Mr. Richard S. Salzman,* Attorney, Department of Justice, for appellees. *Assistant Attorney General Douglas, Messrs. David G. Bress,* United States Attorney, and *Morton Hollander,* Attorney, Department of Justice, were on the brief, for appellees.

Before Fahy, Burger and Wright, *Circuit Judges.*

Per Curiam: The appeal is from dismissal of an action for damages and related injunctive relief, filed in the District Court by a non-resident alien against the United States without its consent with respect to a non-justiciable issue, namely, damage to property in a foreign country said to have been caused by the armed forces of the United States acting under authority of the Government of the United States.

The order of the District Court dismissing the complaint accordingly is

*affirmed.*

Burger, *Circuit Judge, concurring*: Apart from other considerations, our recent holdings in *Pauling v. McNamara,* 118 U.S.App.D.C. 50, 331 F.2d 796 (1963), *cert. denied,* 377 U.S. 933 (1964), and *Pauling v. McElroy,* 107 U.S.App.D.C. 372, 278 F.2d 252, *cert. denied,* 364 U.S. 835 (1960), are dispositive of this case.

# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 465

EMILIO EMINENTE, PETITIONER

*v.*

LYNDON BAINES JOHNSON, ROBERT S. MCNAMARA AND DEAN RUSK

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION**

Alleging that the military activities in and over North Viet-Nam had damaged property which he owns there, petitioner sued to enjoin the respondents—the President of the United States and the Secretaries of Defense and of State—from continuing those activities, and to recover damages in the amount of one million dollars. The district court dismissed the complaint against the President because it lacked jurisdiction over him, and dismissed the complaint against Secretaries McNamara and Rusk on the grounds "that the plaintiff lacks standing to



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maintain this action, that the complaint fails to raise a justiciable controversy, and that this is an unconsented suit against the United States." The court of appeals affirmed, holding that this was an unconsented suit against the United States which presented a non-justiciable policital question (Pet. App. 1).[1]

The decision of the court of appeals is plainly correct and there is no occasion for further review.

1. Although petitioner purports to sue the respondents in their private capacities, this is actually an unconsented suit against the United States, since "the judgment sought would expend itself on the public treasury * * * or * * * the effect of the judgment would be to restrain the Government from acting * * *." *Dugan* v. *Rank,* 372 U.S. 609, 620; *Ex parte State of New York, No. 1,* 256 U.S. 490, 500; *In re Ayers,* 123 U.S. 443, 492.

Petitioner to the contrary, the conduct complained of is within the authority vested by the Constitution in the Executive. The President possesses "in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs" (*Chicago & Southern Air Lines* v. *Waterman S.S. Corp.,* 333 U.S. 103, 109), and his "very delicate, plenary and exclusive" power in the field of foreign relations "does not re-

[1] In the court of appeals, petitioner withdrew his claim for injunctive relief (Pet. 5). The propriety of the district court's dismissal of the complaint as to President Johnson, which petitioner challenged in the court of appeals, is not questioned by the petition.

quire as a basis for its exercise an act of Congress * * *'' (*United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320). The direction of military activity in Viet-Nam thus clearly is within the Executive's constitutional authority.

There is no merit to the contention that the President cannot authorize such activity without a congressional declaration of war. It is clear that "hostilities may subsist between two nations'' without a declaration of war (*The Eliza,* 4 Dall. 37, 40; H. Rep. No. 127, 82d Cong., 1st Sess., p. 20) and that authority to direct such hostilities is implicitly granted the President by the Constitution (see *In re Neagle,* 135 U.S. 1, 64). Indeed, the "Executive has used force abroad at least a hundred times to accomplish national purposes without reference to Congress.'' Rogers, *World Policing and the Constitution* (1945), p. 56; see H. Rep. No. 127, 82d Cong., 1st Sess., pp. 55–62; H. Doc. No. 443, 84th Cong., 2d Sess. In any event, Congress has approved the action thus taken under the independent authority of the President both expressly (in the "Gulf of Tonkin Resolution'', 78 Stat. 384) and by appropriating funds to support that action (Pub. L. 89–18, 79 Stat. 109; Pub. L. 89–367, 80 Stat. 36).

2. Since this suit seeks in effect to have the courts alter the direction of the nation's foreign policy, the court below properly held that it presented a nonjusticiable political question. This case is not one which merely "touches foreign relations'' (*Baker* v. *Carr,* 369 U.S. 186, 211); it involves a direct chal-

lenge to the wisdom of the Executive's decision as to how our foreign relations ought to be conducted. As this Court has said (*Johnson* v. *Eisentrager*, 339 U.S. 763, 789):

> Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. * * * The issue tendered * * * involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible.

See, also, *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111; *Baker* v. *Carr*, *supra*, at 217; *Marbury* v. *Madison*, 1 Cranch 137, 166.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
*Solicitor General.*

SEPTEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

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## REPLY OF PETITIONER.

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## REPLY OF PETITIONER.

The memorandum of respondents in opposition completely evades the issue here.

Since, by express allegation in the complaint, no recovery was sought from the United States through a judgment against respondents (Pet. 4), the judgment sought could not possibly "expend itself on the public treasury" (Opp. 2). Nor could it "restrain the Government from acting" (Opp. 2), since the suit, as submitted below, was for private damages only. It is of the utmost significance then that not a single case cited by respondents, nor by the court below, involved a suit for private damages.[1]

[1]In the first of the *Pauling* cases cited in the concurring opinion below (Pet. App. 2), there was, it is true, a claim by some of the litigants for damages, but in footnote 2 in that case, 278 F. 2d at page 253, it is noted that those claims, by admission in the complaints, were "not monetarily compensable." Also, the case relied on in both of the *Pauling* cases, *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, involved only a claim for injunctive relief.

Thus, the quotation in the petition, at page 11, from *Nixon v. Herndon*, 273 U.S. 536, is directly in point. That the suit involves political action, or foreign relations, or any other area of governmental concern, is wholly irrelevant. The question is solely whether the damage complained of was authorized. Respondents apparently realize this in attempting to defend the damage by reference to the "Gulf of Tonkin Resolution," and certain appropriations. Whether they did, and could, authorize the damage complained of, is, indeed, for the courts to decide. *Wheeldin v. Wheeler*, 373 U.S. 647, 650-51, cited on this in the petition, at pages 8-9.[2] But that is just what the courts below declined to do.

Respectfully submitted,

GEORGE T. ALTMAN,

*Attorney for Petitioner.*

---

[2]The memorandum in opposition, in a footnote on page 2, says that the petition does not question the action below as to President Johnson. We do not understand the petition to be thus limited.